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Order 95-2-44

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

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on the 22nd day of February, 1995

OST-95-232-23

International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention

Docket 49152

ORDER

On September 24, 1993, the International Air Transport Association (IATA) filed an application requesting approval of, and antitrust immunity for, intercarrier discussions concerning the limits and conditions of passenger liability established by the Warsaw Convention (Convention).

IATA states that pending ratification and entry into force of Montreal Protocols Numbers 3 and 4 to the Convention, there is a need for interim passenger liability rules that are adequate to current day standards of compensation. The current regime, as embodied in the Montreal intercarrier agreement of 1966 (Agreement) and which covers all carriers serving the United States, establishes a liability limit of $75,000 for personal injury and death.1 Adjusted for inflation, IATA notes that this amount would be over $300,000 in today's dollars. Despite this, adherence to the Agreement's $75,000 limit continues to be a condition for all carriers to operate to the Untied States. Against this background, IATA states that air carrier parties to the Agreement need the authority to discuss bringing the Agreement up to date. It states that such discussions may include possible amendments to, or replacements for, this Agreement. IATA states that its request for discussion authority and antitrust immunity is consistent with Department precedent.

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1 The Warsaw Convention, to which the United States became a party in 1934, established a number of uniform rules regarding international air transportation, including in Article 22 an air carrier liability limit of approximately $10,000 for each passenger injury or death, absent a finding of willful misconduct. The Hague Protocol of 1955, which doubled the liability limit, was not ratified by the United States. Rather, in 1966, the carriers serving the United States agreed to adopt a special contract under Article 22, establishing what remains the current regime (Agreement CAB 18900, approved by Order E-23680, May 13, 1966 (Docket 17325). Under the Agreement's terms, these carriers also agreed not to avail themselves of the defense of non-negligence under Article 20(1) of the Convention for claims under that amount.

No answers were filed in response to the IATA application.

Decision

The Department has decided to grant the requested discussion immunity subject to the conditions described below. The United States has a firmly-established policy that liability limits should be adequate to contemporary standards of compensation and that the current regime needs to be updated to provide sufficient protection to the traveling public. We are granting the application because the discussions proposed by IATA may bring about an interim solution that will serve either until Montreal Protocols 3 and 4 are ratified and enter into force, or until negotiation and entry into force of a new Convention meeting all U.S. requirements.

We may authorize intercarrier discussions and grant them antitrust immunity where we find that the discussions are necessary to meet a serious transportation need or to achieve important public benefits and that such benefits or need cannot be secured by reasonably available alternatives that are materially less anticompetitive. 49 U.S.C. 41308, 41309.

The purpose of the discussions in this case is to secure the important public benefit of a liability regime that reflects contemporary standards of compensation. The discussions are consistent with a strong and long-standing Department policy of seeking a uniform set of passenger liability rules that meet today's needs.

We find that there are no reasonably available alternatives to the requested discussions having a materially less anticompetitive effect. The best alternative, of course, is an international agreement such as the Montreal Protocols and Supplemental Compensation Plan, but it is because that approach has proven to be such a complex and lengthy one, and given the pressing need to have an updated liability regime, that we are entertaining this discussion authority request. Another alternative would be to allow individual carriers to apply to the Department for modifications to their tariffs and conditions of carriage to implement individual new special contracts under Article 22 of the Convention. We do not believe that approach is workable. Some carriers would probably attempt this, while others would not. Those that did would likely offer contracts with different terms from one another. One clear and unacceptable result of such an approach would be that portions of the traveling public would not be adequately protected. A final alternative would be for the United States to unilaterally establish a regime that all carriers operating to the United States would have to abide by. This approach, however, could engender such significant opposition from our trading partners that our ability to implement the plan unilaterally could very well be jeopardized.

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[2] We assume for the purposes of our decision here that the proposed discussions could reduce competition among carriers.

We also find that the requested approval and grant of antitrust immunity to discuss an interim liability regime is appropriately limited in nature and well-calculated to achieve a result consistent with our objective of having in place a liability regime that reflects contemporary standards of compensation. IATA seeks discussions geared toward producing a temporary arrangement, recognizing the immediate need to increase the liability limits through a uniform system of rules. This is fully consistent with our objectives. IATA would announce a place and date for such discussions and has said that it would invite all its member carriers.

IATA requests that we not impose conditions on such discussions that would restrict the ability of the participant carriers to consider all options in structuring a liability regime. We will not impose conditions other than those that we consider standard and which we have set out below. However, we believe that in constructing any intercarrier agreement, the participants should seek to reflect the basic objectives which we have pursued in our efforts to secure ratification of the Montreal Protocols and creation of a supplemental compensation plan. We have strived for a uniform international system that allows U.S. victims to receive fair recoveries within a reasonable period of time. Specifically, we would expect that any agreement reached by the carriers would be consistent with the following guidelines: first, with regard to passenger claims arising from international journeys ticketed in the United States, passengers would be entitled to prompt and complete compensation on a strict liability basis with no per passenger limits and with measures of damages consistent with those available in cases arising in U.S. domestic air transportation; second, this coverage should be extended to U.S. citizens and permanent residents traveling internationally on tickets not issued in the United States.

We have decided to grant the request for discussion authority and antitrust immunity in this order, rather than through a show-cause proceeding. The discussions sought by the applicants seek to carry out our established public policy goal, the modernization of passenger liability limits. Implementing that goal as soon as possible will redound to the immediate benefit of the traveling public and therefore provide important public benefits. We are willing to grant antitrust immunity in this instance because, unlike most situations where it has been sought, the purpose of the discussions at issue here is fully consistent with the public interest. Furthermore, any agreement reached by the carriers may not be implemented without our approval, and interested persons will have an opportunity to comment on any application for such approval.

In addition, to minimize any adverse impact on the public interest, we will condition our approval and grant of antitrust immunity upon the following express conditions: (1) the discussion authority is limited to 120 days from the date of publication of this order; (2) advance notice of any meeting shall be given to all U.S. and foreign air carriers as well as to the Department of Transportation and the Department of Justice; (3) representatives of the Department of Transportation and the Department of Justice shall be permitted to attend the meetings authorized by this order; (4) IATA shall file within 14 days with the Department a report of each meeting held including *inter alia* the date, place, attendance, a copy of any information submitted to the meeting by any participant, and a summary

of the discussions and any proposed agreements; (5) any agreement reached must be submitted to the Department for approval and must be approved before its implementation; (6) the attendees at such meetings must not discuss rates, fares or capacity, except to the extent necessary to discuss ticket price additions reflecting the cost of any passenger compensation plan; and (7) the discussions will be held in the metropolitan Washington, DC. area.

ACCORDINGLY,

1. The Department approves the request for discussion authority filed by IATA in this docket, subject to the restrictions listed below, under section 41308 of title 49 of the United States Code, for 120 days from the date of publication of this order, for discussions directed toward producing a uniform set of passenger liability limits;

2. The Department exempts persons participating in the discussions approved by this order from the operation of the antitrust laws under section 41309 of Title 49 of the United States Code;

3. The Department's approval is subject to the following conditions:

(a) Advance notice of any meeting shall be given to all identifiably interested U.S. air carriers and foreign air carriers, as well as to the Department of Transportation and the Department of Justice;

(b) Representatives of the entities listed in subparagraph (a) above shall be permitted to attend all meetings authorized by this order;

(c) IATA shall file within 14 days with the Department a report of each meeting held including *inter alia* the date, place, attendance, a copy of any information submitted to the meeting by any participant, and a summary of the discussions and any proposed agreements;

(d) Any agreement reached must be submitted to the Department for approval and must be approved before its implementation;

(e) Attendees at such meetings must not discuss rates, fares or capacity, except to the extent necessary to discuss ticket price additions reflecting the cost of any passenger compensation plan;

(f) The Department shall retain jurisdiction over the discussions to take such further action at any time, without a hearing, as it may deem appropriate; and

(g) Any meetings authorized by this order shall be held in the metropolitan Washington, D.C. area.

4. Petitions for reconsideration may be filed pursuant to our rules in response to this order;

5. We will serve a copy of this order on all parties served by IATA in this docket, as indicated by the service list attached to its application; and

6. We will publish a copy of this order in the Federal Register.

By:

Patrick V. Murphy
Acting Assistant Secretary for
Aviation and International Affairs

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